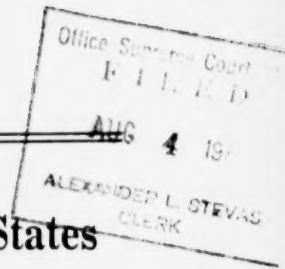


No. 83-46

In The
Supreme Court of the United States
October Term, 1983



KIZZIER CHEVROLET CO., INC. OF SCOTTSBLUFF,
NEBRASKA, and DWAYNE KIZZIER,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

We submit that the following questions are presented by the Petition for Writ of Certiorari:

(1) Whether a federal court must certify a previously unresolved issue of state statutory construction to the state's highest court for resolution when the state's legislature has adopted a procedure whereby the state court "may in its absolute discretion, accept or reject such request for certification. . . ."¹

(2) Whether a federal court is bound to consider the issue of certification when not requested to do so by the complaining party until an adverse decision is rendered, even though that party had ample opportunity to make an earlier request.

¹See Nebraska Statute, Section 24-219, et seq., R. R. S. 1943 (1982 Cum. Supp.), contained in Petitioner's Appendix D.

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STATUTES INVOLVED

In addition to those cited by Petitioners, Nebraska Statutes 60-1429 and 60-1430 are relevant. See our Appendix A.

STATEMENT OF THE CASE

This is a breach of contract action brought by Petitioner² against General Motors Corporation on a dealer sales and service agreement. Petitioner, a Chevrolet dealer, purchased an Oldsmobile dealership from another dealer. General Motors challenged this sale and refused to recognize it pending a resolution by the state administrative body, and courts, of whether it was required to do so under the state's Motor Vehicle Industry Licensing Act.³ General Motors prevailed before the administrative body, and the lower state court, but ultimately lost its challenge in the Nebraska Supreme Court and, therefore, recognized the transfer.

The federal District Court, as affirmed by the U. S. Court of Appeals, construed the Nebraska Licensing Act as follows:

"The provisions of the Nebraska Motor Vehicle Industry Licensing Act are geared toward preserving the status quo until the licensing board has the opportunity to consider and rule on an application. Thus in §§ 60-1420, 60-1421, and 60-1422, before a franchisor can terminate a franchise, establish a franchise once terminated, or establish an additional franchise, it must first establish in a hearing before the board good cause to do so. A similar order of priority is not specified in §§ 60-1430 or 60-1429(2). I do not read these

²Dwayne Kizzier, sole stockholder of Kizzier Chevrolet, was dismissed by the District Court as a party plaintiff, and that order was not appealed. A cause of action based on the Automobile Dealers Day in Court Act, USC, §§ 1221-1225 was also dismissed and not challenged on appeal.

³The Court relied on §§ 60-1429(2) and 60-1430 of the Act in reaching its decision. See our Appendix A for the text of those statutes.

sections as requiring that the franchisor recognize a change in franchise ownership *until* it makes the necessary showing, but rather *unless* it makes the necessary showing. With the policy of preserving the status quo in mind, I find that a franchisor is not required to give effect to a contract for a *change* of ownership until it has had the opportunity to make the necessary showing." (Emphasis the Court's.)⁴

The Court of Appeals affirmed on this issue stating:

"In sum, we defer to the district court on this issue of state law. Thus, there can be no breach of the dealer agreement by GM for failing to recognize Kizzier as the Oldsmobile dealer when GM was not obligated under state law to do."⁵

Contrary to Petitioner's statement, this state law issue was briefed and argued to the Court of Appeals.⁶

Petitioner also asserts that the Nebraska statute permitting certification of state law issues to the state courts was not effective until after the briefs were filed in the Court of Appeals. However, the Act became effective on July 17, 1982, and petitioner's Reply Brief was filed on July 30, 1982. No request for certification was made in the Reply Brief, or anytime thereafter including at oral argument. Petitioner's first request to the Court came in its Petition for Rehearing after it had lost the case.

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⁴See Petitioner's Appendix B, p. 35.

⁵See Petitioner's Appendix A, p. 14.

⁶See Appellant's Brief, pp. 10-12; Appellee's Brief, pp. 14-15; and Appellant's Reply Brief, p. 1, et seq.

ARGUMENT

There are several reasons why this case is one which the United States Supreme Court should not review on writ of certiorari.

First, it does not involve an important question of federal law which has not already been settled by this Court. In *Lehman Brothers v. Schein*, 416 U. S. 386 (1974), this Court considered the question of when it is appropriate for a United States Court of Appeals to certify an issue of state law, in a diversity case, to the highest court of the state for decision. The instant case poses no new, or different, question which has not been already answered in that case.

Second, the holding in *Lehman* would require affirmance in this case. The United States Supreme Court held that it is within the court's discretion whether to certify an issue to a state court. In the language of the Court:

"We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism. *Its use in a given case rests in the sound discretion of the federal court.*" (Emphasis added.) 416 U. S. at 391.

The *Lehman Brothers* case was a shareholders' derivative action brought in New York. The Federal Court of Appeals reversed the district court holding, and concluded the Florida courts "would probably" allow recovery. On rehearing, the Court of Appeals denied the defendants' request that the court utilize the certification procedure under Florida law permitting decision of state law questions by the Florida Supreme Court. This Court

vacated the Second Circuit's decision and remanded it to that court so that it "may reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court. . . ." 416 U.S. at 391-392.

It is significant that this Court did not *direct* the Court of Appeals to certify the question, but allowed it to "reconsider" its action on that issue. This was further explained by Justice Rehnquist in the concurring opinion as follows:

"The question of whether certification on the facts of this case, particularly in view of the lateness of its suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave to the sound judgment of the court making the initial choice. But since the Court has today for the first time expressed its views as to the use of certification procedures by the federal courts, I agree that it is appropriate to vacate the judgment of the Court of Appeals and remand the cases in order that the Court of Appeals may reconsider certification in light of the Court's opinion."

The Eighth Circuit Court of Appeals, in the case at bar had the benefit of the *Lehman* decision for guidance, and still exercised its discretion to deny the petitioner's belated request for certification. Its action is, therefore, consistent with *Lehman* and granting certiorari in this case would serve no useful purpose.

Third, the decisions cited by Petitioner as a basis for granting certiorari are clearly distinguishable. In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) and *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944), the Supreme Court directed the Court of Appeals

to permit an interpretation of the state statute to be sought through the state court's declaratory judgment procedures. However, those cases each involved the constitutionality of the state statute. In that instance, a federal court must be careful to avoid deciding the constitutionality of the state statute when the state court may interpret it so as to avoid the issue entirely. As this Court in *Leiter* stated, quoting from *Spector*:

" . . . as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." 352 U. S. at 228-229.

The constitutionality of the Nebraska Motor Vehicle Industry Licensing Act has never been challenged in this case. The issue is, therefore, merely one of state law, and the public policy factor as expressed in the *Leiter* and *Spector* decisions is not involved. The Eighth Circuit properly exercised its discretion in refusing to certify the issue to the Nebraska Supreme Court.⁷

Fourth, we submit that the question presented for review was not properly raised below. Petitioner requested that the state law issue be certified to the State Court *after* it discovered that the Eighth Circuit Court of Appeals ruled against it. While the Nebraska state law permitting

⁷This controversy has already been to the Nebraska Supreme Court twice. The Nebraska Court dismissed the second case as an attempt by Kizzier to collaterally attack an earlier decision by the administrative board. Judge Bright noted, in the 8th Circuit's opinion, that the Supreme Court had an opportunity to consider a related issue, which might provide some guidance in this case, but decided not to reach it. See Petitioner's Appendix A, pp. 13-14.

certification did not become effective until July 17, 1982, this was before Petitioner's Reply Brief was filed, and long before oral argument on February 14, 1983. Under these circumstances, we contend that Petitioner has waived this issue.

Finally, other meritorious arguments were presented below by General Motors Corporation. Even if the state law issue of statutory construction were certified to the Nebraska Supreme Court, and it ruled in Petitioner's favor on that issue, General Motors Corporation could still prevail on another independent ground approved by the District Court.⁸ As the Eighth Circuit observed in arriving at its ruling:

"Because we base our decision on this issue on the District Court's Ruling that a franchisor, under Nebraska Law, is not required to recognize immediately a change in ownership of a franchise, we need not reach the District Court's application of equitable principles as a bar to Kizzier's claim for damages."

Therefore, certification could become a moot issue, and simply result in needless delay.

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⁸See District Court's Opinion, Petitioner's Appendix B, pp. 30-34.

⁹See Court of Appeals' Opinion, Footnote 4, Petitioner's Appendix A, p. 12.

CONCLUSION

For the foregoing reasons, and each of them, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

60-1429. *Franchise; termination, discontinuance; not valid provisions.* Notwithstanding the terms, provisions or conditions of any agreement or franchise, the following shall not constitute good cause for the termination or non-continuation of a franchise, or for entering into a franchise for the establishment of an additional dealership in a community for the same line-make:

(1) The sole ~~fact~~ that franchisor desires further penetration of the market;

(2) The change of ownership of the franchisee's dealership or the change of executive management of the franchisee's dealership, unless the franchisor, having the burden of proof, proves that such change of ownership or executive management will be substantially detrimental to the distribution of franchisor's motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer products in the community; or

(3) The fact that the franchisee refused to purchase or accept delivery of any motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer or vehicles, parts, accessories or any other commodity or service not ordered by the franchisee.

Source: Laws 1971, LB 768, § 29.

60-1430. *Franchise; provisions or conditions changing.* Notwithstanding the terms, provisions or conditions or any agreement or franchise, subject to the provisions of subdivision (2) of section 60-1429, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business or by stock trans-

App. 2

fer or in the event of change in the executive management of the franchisee's dealership the franchisor shall give effect to such a change in the franchise unless the transfer of the franchisee's license under this act is denied or the new owner is unable to obtain a license under this act as the case may be.

Source: Laws 1971, LB 768, § 30.